IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JAMES T. BUTLER and KATHLEEN BUTLER, Appellants, v. AMTICO INTERNATIONAL INC.; ASARCO INCORPORATED; ASBESTOS CORPORATION LIMITED; ATLAS TURNER, INC.; BARTELL'S ASBESTOS SETTLEMENT TRUST; BELL ASBESTOS MINES LTD.; C. BLACKSTOCK LUMBER CO., INC.; CONGOLEUM CORPORATION; DOMCO PRODUCTS TEXAS, L.P.; DOWMAN PRODUCTS, INC.; DUNN LUMBER CO., INC.; FRYER-KNOWLES, INC.; GATKE CORPORATION; GEORGIA-PACIFIC CORP; H.B. FULLER COMPANY; KENTILE FLOORS, INC.; LAKE ASBESTOS OF QUEBEC, LTD.; MAJOR BRANDS; MANNINGTON MILLS, INC.; MORTRUDE FLOOR COMPANY; METROPOLITAN LIFE INSURANCE COMPANY; MOHASCO CORPORATION; MURRAY B. MARSH, COMPANY, INCORPORATED; PNEUMO ABEX CORPORATION; QUIGLEY COMPANY, INC.; SEA-PAC SALES	)	NO. 56302-5-I **DIVISION ONE** UNPUBLISHED OPINION

COMPANY; SEARS ROEBUCK & COMPANY; SOUND FLOOR COVERINGS, INC.; TARKETT, INC.; FLINTKOTE COMPANY, THE; TILE COUNCIL OF AMERICA, INC.; UNION CARBIDE CORPORATION; UNIROYAL, INC.; WANKE PANEL COMPANY; and FIRST DOE through ONE HUNDREDTH DOE;

Respondents.

FILED: July 31, 2006

APPELWICK, C.J. — James Butler sued Tile Council of America (TCA), alleging that it had licensed manufacturers to use its formula to create "thin set" ceramic tile mortar that contained asbestos, and that exposure to this mortar caused Butler's mesothelioma. The trial court granted TCA's motion for summary judgment, and Butler appeals. We hold that Butler has not produced sufficient evidence to show he was exposed to a thin set product associated with TCA, and affirm.

FACTS

In 2004 James Butler was diagnosed with mesothelioma, a cancer in the lung lining caused by asbestos exposure. See Berry v. Crown Cork & Seal Co., 103 Wn. App. 312, 314, 14 P.3d 789 (2000). Butler and his wife sued numerous entities under theories of negligence, strict liability, civil conspiracy, negligent misrepresentation, and loss of consortium. One of these entities was Tile Council of America (TCA), a non-profit trade organization that promotes the use of ceramic tile in the United States. TCA patented a formula for "thin set," a

mortar glue used to affix ceramic tile, and licensed that formula to some manufacturers.

TCA moved for summary judgment, alleging that Butler had not shown that he was exposed to any products manufactured or supplied by TCA. In his deposition, Butler had stated that when he worked as a floor installer from the late 1960s to early 1970s, he remembered working with two brands of thin set. TCA noted that these two manufacturers were not affiliated with TCA.

The trial court granted TCA's motion for summary judgment. Butler appeals.

ANALYSIS

TCA claims that Butler did not show he used any product connected with TCA. TCA argues that the only two thin set brands Butler remembers using were DuraRock and Fuller O'Brien, neither of which Butler asserts has any connection with TCA. TCA claims that Butler's attorneys' later attempt to correct Butler's alleged mistake in naming the products he worked with is insufficient.

Summary judgment is appropriate if there is no genuine issue of material fact. Hash v. Children's Orthopedic Hosp., 110 Wn.2d 912, 915, 757 P.2d 507 (1988). The court must consider all facts and reasonable inferences in the light most favorable to the nonmoving party. Mountain Park Homeowners v. Tydings, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). Plaintiffs in asbestos cases may rely on circumstantial evidence that the defendant's products were the source of their asbestos exposure. Van Hout v. Celotex Corp., 121 Wn.2d 697, 706, 853

P.2d 908 (1993). However, “[t]he facts relied upon to establish a theory by circumstantial evidence must be of such a nature and so related to each other that it is the only conclusion that fairly or reasonably can be drawn from them.

A verdict cannot be founded on mere theory or speculation." Schmidt v. Pioneer United Dairies, 60 Wn.2d 271, 276, 373 P.2d 764 (1962).

Butler has submitted insufficient evidence that he used a thin set associated with TCA. In his deposition in October 2004, Butler testified that the primary thin set or glue he used was DuraRock. When asked if he remembered any other brand names or manufacturers, Butler replied that "Fuller O'Brien made a prefinish glue" that he used on jobs with ceramic tiles. Butler did not remember any other brand names or manufacturers of glue or thin set products, stating "[t]hat's primarily the two." Butler has not alleged or established that either DuraRock or Fuller O'Brien were TCA licensees or used any of TCA's formulas or patents.

Butler's attorneys later attempted to overcome this deficiency in his April 2005 second response to TCA's summary judgment motion. Counsel noted that a company called H.B. Fuller manufactured a thin set mortar licensed by TCA, and stated in a footnote: "While Mr. Butler identifies the 'thin set' product as Fuller O'Brien 'thin set', this was never a product that was made, sold or distributed by the Fuller O'Brien paint company. H.B. Fuller did make and sell [TCA] 'thin set' tile mortar during the time period when it was asbestos-containing." However, Butler did not submit a declaration or any other evidence to support his apparent contention that when he said Fuller O'Brien, he actually

meant H.B. Fuller.[1] This similarity in manufacturer name, without any additional evidence, is insufficient to create a genuine issue of material fact that Butler used a product connected with TCA. A jury would be forced to speculate as to whether Butler really meant that he used H.B. Fuller thin set.

Butler contends that under the circumstantial evidence standard described in Van Hout and Lockwood v. A C & S, Inc., 109 Wn.2d 235, 744 P.2d 605 (1987), the evidence reasonably permitted an inference that he was exposed to a TCA product. But in both Van Hout and Lockwood, the plaintiffs produced evidence that the defendants' products were present at their work sites. Van Hout, 121 Wn.2d at 707; Lockwood, 109 Wn.2d at 244. Butler has submitted no such evidence. Because Butler did not show this connection, we need not consider any of his additional claims.

We affirm.

Appelwick, C.J.

WE CONCUR:

Cox, J.

Becker, J.

[1] In a June 2005 deposition, taken after the April 2005 grant of TCA's motion for summary judgment, Butler stated that he made a mistake when he earlier said that he used a Fuller O'Brien thin set. He testified that he used H.B. Fuller ceramic tile adhesive. However, a commissioner of this court denied Butler's motion to introduce this evidence on review, ruling that Butler had shown no reason why this evidence could not have been introduced as soon as TCA had brought up the brand name issue in its March 2005 reply supporting its motion for summary judgment. Thus, we cannot consider this new deposition on review.